No. 14289.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY EDWARD FLORENTINE,

Appellant,

vs.

H. R. LANDON as District Director Immigration and Naturalization at Los Angeles, and HERBERT BROWNELL as Attorney General of the United States,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Jurisdiction.

This appeal is taken from a judgment of dismissal which was entered December 2, 1953 by the District Court of the United States, Southern District of California, Central Division, which dismissed petitioner-appellant's petition upon the grounds that there was a failure to state a claim upon which relief could be granted and that there had been a failure to join an indispensable party.

Paragraph III of the petition on file herein [T. R. 4] alleges that the action was brought "under the provisions of Section 903 of the Nationality Act (8 U. S. C. A.), and additionally, under the provisions of the Declaratory Judgment Act, Section 2201 of the New Federal Judicial Code." Whether or not appellant obtained jurisdiction and stated a claim under those statutes is the question to be decided.

This Court has jurisdiction of this appeal pursuant to the provisions of 28 U. S. C. 1291 and 1291(1), there being no dispute that the judgment entered by the District Court is a final judgment [T. R. 13].

Statutes Involved.

Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) reads in part as follows:

> "§903. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment.
>
> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *"

Statement of Case.

On December 9, 1952 petitioner filed his original petition under Section 503 of the Nationality Act of 1940 (8 U. S. C. A., §903). In that petition, H. R. Landon was named as respondent. Landon is the local District Director of Immigration and Naturalization. The petition alleged that Florentine was a citizen and national of the United States and prayed for judgment declaring him to be a citizen.

The above referred to original petition, naming only H. R. Landon, did not conform to the requirements of Section 503 in that it did not name the "head of the Department." The Department involved in such cases is

the Department of Justice, which is under the direction of and "headed" by the Attorney General of the United States. Therefore, on March 10, 1954 the respondent, Landon, filed a motion to dismiss for lack of jurisdiction over the subject matter, failure to state a claim upon which relief can be granted and failure to join an indispensable party. Before a hearing was had on this motion, however, on April 9, 1953, the petitioner filed an amended petition naming both Landon and Herbert Brownell, Attorney General of the United States, as respondents.

Section 503 of the Nationality Act was repealed on June 27, 1952, c. 477, Title IV, §403(a)(42), 66 Stat. 280, and the statute expired on December 24, 1952. Between the time the original petition naming an incorrect party had been filed and the time the amended petition was filed, the statute authorizing such a proceeding had expired. The Attorney General then moved to dismiss the amended petition under F. R. C. P. 12(b)(1), (2) and (6), 28 U. S. C. A. The parties stipulated that the motion made by Landon to the original petition should be considered as having been made to the amended petition.

Thereafter, on September 8, 1953, the Court filed its written Memorandum of Decision dismissing the action for failure to state a claim upon which relief could be granted and failure to join an indispensable party. *Florentine v. Landon,* 114 F. Supp. 452 (1953). The Court in so ruling found that the amended petition had not made the Attorney General a party as it had been filed after the statute authorizing the action had expired. A judgment of dismissal was entered December 2, 1953.

ARGUMENT.

A. The Original Petition Filed in the Action Failed to Conform to the Statute Authorizing Such Actions.

Petitioner brought his action for a declaratory judgment of citizenship under Section 903 of Title 8, U. S. C. A. This section provides the remedy and prescribes the "judicial proceedings for declaration of United States' nationality in event of denial of rights and privileges as national."

The section states:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, * * * may institute an action against the *head of such Department* * * * in the District Court of the United States * * * for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *" (Emphasis supplied.)

Consequently, the head of the Department is the person against whom the action must be instituted.

H. R. Landon, against whom the original petition was brought, was not the head of the Department of Justice. The proper party respondent should have been the Attorney General of the United States. He is the head of the Department of Justice, in which Department the Immigration and Naturalization Service is but a division. It must be concluded, therefore, that such a suit against H. R. Landon is not authorized by statute and fails to state a claim for which relief can be granted.

Secondly, in such a suit, the Attorney General is an indispensable party, and where an indispensable party is not before the Court, the only possible course for the Court to pursue is to dismiss.

Paper Container Mfg. Co. v. Dixie Cup Co., 74 F. Supp. 389, cert. den. 69 S. Ct. 515, 336 U. S. 909, 93 L. Ed. 1074, rehear. den. 69 S. Ct. 655, 336 U. S. 929, 93 L. Ed. 1089;

Barr v. Rhodes, 35 F. Supp. 223;

American Insurance Co. v. Bradley Mining Co., 57 F. Supp. 545.

The Attorney General is an indispensable party because the statute specifically provides that these actions must be brought against the "head of the Department." The Attorney General, as head of the Department of Justice, is charged with the defense of such actions and should be the party named pursuant to the statute. The plain meaning of the words of the statute cannot be interpreted in any other way.

Congress has waived sovereign immunity from suit by enacting Section 903 of Title 8. In waiving that immunity, it has specified certain conditions which are to be complied with in the event such an action is instituted. One of the conditions is that the head of the Department must be named as the party against whom the action is brought. Since the action may only be instituted against one person, that person is certainly an indispensable party to the action.

B. The Amended Petition Should Not Relate Back to Allow Appellant to Name New Party After Statute Expired.

It is undisputed that the Courts have been very liberal in permitting amendments to pleadings. However, the amended pleading filed in the instant action fails to make the Attorney General a party and fails to state a claim upon which relief can be granted, because it was filed after the statute expired.

The general rule is that an amended pleading will relate back to the date of the original pleading. That general rule is set forth in Rule 15(c) of the Federal Rules of Civil Procedure, which is quoted as follows:

> "(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

However, the above is the general rule which does not apply under all circumstances and should not apply in the instant case.

As the Court knows, the right to file an action under Section 903 of Title 8 expired on December 24, 1952. It is not unlikely thinking to liken this case to one wherein the statute of limitations is involved, *i. e.,* the right of action in both cases expires on a particular date. Thus, using this analogy, the petitioner's amended complaint naming the new party must be such that the doctrine of relation back will apply, so that the original filing date of the original complaint will bring the petitioner within the jurisdiction of the Court before the expiration date of the statute under which he sues. Without the doctrine

of relation back applying to the petitioner's case, the amendment would be of no avail.

The rule with regard to the doctrine of relation back is stated in *Sechrist v. Palshook,* 97 F. Supp. 505, wherein it is stated:

> "Where amendment to record changing name of defendant has the effect of substituting new party for defendant, amendment would amount to new and independent cause of action and cannot be permitted when the statute of limitations has run."

A further statement of the rule is that the amendment of a complaint to change the name of a defendant relates back to the date of the original complaint if the effect of the amendment is merely to correct a misnomer, *but if the effect of the amendment is to bring into a case a new party defendant that was not served with summons or complained against in the original action, amendment does not relate back to time of original complaint and action as to such party is barred by limitations.*

The appellant states in his opening brief on page 4 thereof that he agrees with the statement of the law and the cases cited in the decision of the District Court; namely:

> *Davis v. L. L. Cohen & Co.,* 268 U. S. 638, 45 S. Ct. 633, 69 L. Ed. 1129;
>
> *Schram v. Poole* (9 Cir., 1938), 97 F. 2d 566, 572;
>
> *Hammond Knoylton v. United States* (2 Cir., 1941), 121 F. 2d 192.

The cases are cited in the opinion below as standing for the rule that a party may not amend after the statute of limitations has run to name a party who was not previously named. The appellant attempts to contrast

these cases, however, by pointing to the fact that they did not involve a Savings Clause.

Deferring the reply to appellant's Saving Clause argument for the moment, we will discuss further the doctrine of relation back. Such a problem arose in the case of *Mellon v. Arkansas Land & Lumber Co.,* 275 U. S. 460, 48 S. Ct. 150, 151, 72 L. Ed. 372. Actions were to be instituted against an agent designated by the President where there were claims against the United States arising out of the Government's control of the railroads during World War I. The agent originally named in the complaint had resigned and there was an attempt to amend the complaint to substitute the name of the proper agent. This amendment, however, was made after the statute of limitations had run. The Court said at 275 U. S. 460, 462:

> "* * * The bringing of the suit against Payne, who was not the designated Agent, was not a compliance with this requirement and brought no representative of the Government before the court. *Davidson v. Payne* (C. C. A.), 289 Fed. 69. The substitution of Davis, the designated Agent, was not the correction of an error in the name of the defendant, but the bringing in of a different defendant, and was in effect the commencement of a new and independent proceeding against him to enforce the liability of the Government. See Davis v. Cohen Co., 268 U. S. 638, 642; Mellon v. Weiss, 270 U. S. 565, 567. * * *"

It has been held that time limits in statutes waiving sovereign immunity operate as a condition of liability besides operating as a period of limitation. In *United States ex rel. Ranch v. Davis* (1925), 56 App. D. C. 46, 8 F. 2d 907, the plaintiff attempted to amend a judgment

after the statute of limitations had run to name the proper agent of the Government as a party. The Court held that to allow the amendment would be to give validity to a judgment subsequent to the time that Congress had waived sovereign immunity and had granted its consent to suit. The Court also states in that decision that this time limitation on suit when imposed by Congress operated as a condition of liability and cites *Finn v. United States,* 123 U. S. 227, 8 S. Ct. 82, 31 L. Ed. 128; and *Davis, Agent v. L. L. Cohen & Co.,* 268 U. S. 638, 45 S. Ct. 633, 69 L. Ed. 1129.

Under either interpretation referred to above, whether the facts of the instant action are considered analogous to a statute of limitations' situation or a condition of liability, the Attorney General was not a party to the action and cannot be made a party following the expiration of the statute.

C. The Savings Clause Would Not Apply to Allow the Amended Complaint to Relate Back.

There was a Savings Clause enacted as part of the Immigration and Nationality Act of 1952. It is known as Section 405 of the Act of June 27, 1952. That section is set forth in pertinent part as follows:

> "Savings Clause. Section 405 of Act June 27, 1952, provided in part that:
>
> "(a) Nothing contained in this Act [this chapter], unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time

this Act [this chapter] shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing liability, obligation, or matter, civil or criminal, done or existing, at the time this Act [this chapter] shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act [this chapter] are, unless otherwise specifically provided therein, hereby continued in force and effect * * *

"(b) Except as otherwise specifically provided in title III [subchapter III of this chapter], any petition for naturalization heretofore filed which may be pending at the time this Act [this chapter] shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed."

The Savings Clause, however, was not intended to apply to a situation as appears in the instant action. Language in the clause itself discloses that the action, suit or status, "saved" by the clause "shall be valid at the time this act shall take effect." In subsection (b) of the clause pending actions are referred to and are to be "heard and determined in accordance with requirements of law in effect when such petition was filed." At the time of filing the petition, however, on December 9, 1952, the statute required the Attorney General as head of the Department to be the responding party. When the petitioner named the District Director of Immigration, he failed to comply with that statute. Therefore, the Sav-

ings Clause would not apply to this case, because there was really no valid pending action.

As was noted in the discussion above, the Attorney General is the one to be named as defendant or respondent. Under the statute, a specific procedure is set up for petitions of the nature of that filed in the instant case. When the petitioner failed to comply with the statute, no officer or agent of the Government was before the Court and the petition was in legal effect, a nullity. There was actually nothing to save unless an amendment joined the Attorney General before the statute expired, which was not done.

If the Savings Clause were carried to the extreme which is urged by the appellant herein, it would seem that anyone born prior to December 24, 1952, could petition for a declaration of nationality under the Nationality Act of 1940. This interpretation, however, would be incorrect, for we know that actions filed after December 24, 1952, have to be filed and determined according to the Nationality Act of 1952. Congress did not intend that anyone in any circumstances came under the provisions of the old act. Only those which had rights accrued or had obtained some status within the framework of the old law would be entitled to use the provisions of that law.

Numerous decisions state that by enacting a savings clause in a statute, Congress intends that statute to operate prospectively only. There is to be no retroactive effect given to the new statute. The facts of the case at bar, however, fit in to a situation where the Nationality

Act of 1952 is given only prospective application. No cause of action had been stated under the old act as has been discussed above prior to the time it expired. From the date of the expiration of the 1940 Act until the present, the 1952 act has applied. Therefore, when there was an attempt by the plaintiff to state a new cause of action under the old act by adding a new party after its expiration date, it was an attempt to extend the life of the old act beyond the time Congress had intended.

Conclusion.

Appellant has raised the point that the Attorney General had never appeared in the action and his motion to dismiss was not properly before the Court. However, the Notice of Motion, Motion and Points and Authorities submitted in support of the motion filed July 8, 1953 are submitted and filed by Herbert Brownell, appearing specially.

The petition, as originally filed in December of 1952, failed to name an indispensable party and failed to state a claim upon which relief could be granted. This occurred because there had been a clear failure to comply with the statute authorizing suits against an agent of the Government. Appellant's complaint was thereafter amended after the Nationality Act of 1940 had expired. The amended complaint should not relate back to the date of filing the original complaint under these circumstances, and, therefore, the amendment was not effective. An indispensable party was not before the Court when

the statute expired and there was a failure to state a claim upon which relief could be granted.

The Savings Clause enacted with the Nationality Act of 1952 will not aid the appellant in this case. Since the amended complaint could not relate back, there was no proper action or status of the petitioner to save. Congress has power to change the *remedy* and the Savings Clause in the 1952 Act did not preserve the *remedy* of the 1940 Act. *Alvina v. Brownell,* 112 F. Supp. 15 (1953).

Appellee prays that the decision of the District Court be affirmed.

Respectfully submitted,

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